Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES, AND WILLIAM H. SORRELL, AS ATTORNEY GENERAL OF THE STATE OF VERMONT,
Petitioners,

v.

GREEN MOUNTAIN RAILROAD CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As applied to railroads, are pre-construction permitting programs *per se* preempted by 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners State of Vermont, Agency of Natural Resources, and William H. Sorrell, as Attorney General of Vermont (the "State"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit is reported as *Green Mountain R.R. v. State of Vermont*, 404 F.3d 638 (2d Cir. 2005), and is reproduced in the appendix. App. 1a-15a. The opinion of the District Court is reported at 2003 WL 24051562 (D. Vt. Dec. 15, 2003), and is reproduced in the appendix. App. 16a-32a.

JURISDICTION

The judgment of the Second Circuit was entered on April 14, 2005. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, is reproduced at App. 33a.

Relevant sections of Vermont's Act 250, Vt. Stat. Ann. tit. 10, § 6001 *et seq.*, are reproduced at App. 37a-40a.

Relevant provisions of the Interstate Commerce Commission Termination Act ("ICCTA"), 1995, Pub. L. No. 104-88, 109 Stat. 803, codified in part at 49 U.S.C. §§ 10101-11908, are reproduced at App. 33a-36a.

STATEMENT OF THE CASE

1. This case concerns the preemptive scope of the Interstate Commerce Commission Termination Act of 1995, which refined governmental control over the economic regulation of railroads.

Prior to the ICCTA, authority over railroads was governed by the Interstate Commerce Act ("ICA") of 1887, 24 Stat. 379. In the ICA, Congress created the Interstate Commerce Commission ("ICC") and gave it broad authority to regulate the railroad industry. Under the ICA, some economic regulation of railroads was undertaken concurrently by the federal and state governments, while other regulation was left to the states. *See* Clyde B. Atchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L. Rev. 289, 313-14 (1937).

Although there were various changes made to the ICA throughout the 20th century, the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, represented a significant shift in federal policy over rail transportation. This act "began the substantial economic deregulation of the [railroads] and the whittling away of the size and scope of the ICC." H.R. Rep. No. 104-311, 104th Cong., 1st Sess., 82 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 793-94.

The ICCTA continued the goals of the Staggers Rail Act by further "reform[ing] *economic* regulation of transportation." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. 104-422, 104th Cong., 1st Sess., 165 (1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 850 (emphasis added). The act replaced the ICC with the Surface Transportation Board ("STB"), and transferred many of the ICC's powers to the STB.

Part A of the ICCTA, which covers "Rail Transportation," includes provisions addressing the standards for establishing rates, rules, and practices for railroad operations, and it also contains provisions concerning the licensing of certain railroad activities. 49 U.S.C. §§ 10701-10747, 10901-10907. Other parts of the law cover federal-state relations regarding taxes; and enforcement, and civil and criminal penalties. *Id.* §§ 11501-11502, 11901-11908.

Continuing Congress's effort to deregulate the railroad industry, the ICCTA also limits the ability of the federal government and states to impose economic regulation on railroads. *Compare* 49 U.S.C. § 10501 (1995) *with* 49 U.S.C. § 10501 (1990). Accordingly, Section 10501(b), which is entitled "General Jurisdiction," gives the Surface Transportation Board "exclusive jurisdiction" over many aspects of rail transportation. It states:

> (b) The jurisdiction of the Board over–
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive.

App. 34a (49 U.S.C. § 10501(b)).

The ICCTA thus gives the STB jurisdiction and regulatory authority over many aspects of railroad

operations. Its jurisdiction, however, is not co-terminus with its power to regulate. Despite having *jurisdiction* over the operation or construction of "ancillary" projects, for example, the STB recognizes that it has no *regulatory authority* over these same projects. As the STB has conceded:

> Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track.

Borough of Riverdale, Petition for Declaratory Order, S.T.B. Finance Docket No. 33466, 1999 WL 715272 at *4 (I.C.C.) (Sept. 9, 1999).

Of special significance to this case, Congress also made certain remedies "exclusive" by including a preemption provision in Section 10501(b):

> Except as otherwise provided in this part, the remedies provided under this part *with respect to regulation of rail transportation* are exclusive and preempt the remedies provided under Federal or State law.

App. 34a (49 U.S.C. § 10501(b)) (emphasis added).

The Committee of Conference that produced the final version of the ICCTA, explained the scope of this preemption provision and "clarif[ied] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." H.R. Conf. Rep. 104-422, at 167, 1995 U.S.C.C.A.N. at 852. The Report

stressed that Congress did not intend to preempt laws that "do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." *Id.*

2. Vermont's Act 250, Vt. Stat. Ann. tit. 10, § 6001 *et seq.*, is a statewide permitting system that has been "a major feature of the Vermont legal landscape" for over 35 years. *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 87 (2d Cir. 1992). Significantly, "[i]n recognition of the importance of economic growth . . . the focus of the Act is not on barring development but on molding it to minimize its environmental impact." *Id.* at 89.

The principal requirement of Act 250 is that a person must obtain a permit before the construction of improvements that constitute "development" as defined by the statute. App. 40a (Vt. Stat. Ann. tit. 10, § 6081). Accordingly, there is a comprehensive section in the law defining projects that constitute "development" and require a permit. App. 37a-40a (*Id.* § 6001(3)). Furthermore, Act 250 exempts certain railroad projects from the permitting process if the activity does not result in a "physical expansion of the railroad's facilities." App 40a (*Id.* § 6081(i)).

3. Respondent Green Mountain Railroad Corporation ("GMRC") is a "rail carrier" as defined by the ICCTA, 49 U.S.C. § 10102(5), and operates 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. App. 3a. Its operations include serving trans-shipping industries, *i.e.*, businesses that rely on trucks to transport goods from the rail site to other locations. *Id.*

Along its rail line, GMRC owns a 66-acre tract of land (the "Riverside site") in Rockingham, Vermont. App. 3a. The tract of land is bordered on the east side by the